

## **ADDENDUM TO THE FINAL STATEMENT OF REASONS LETHAL INJECTION PROCESS**

### **UPDATES TO INITIAL STATEMENT OF REASONS**

OAL file number 2010-0429-04 S which includes the Initial Statement of Reasons (ISOR) and the Final Statement of Reasons (FSOR), is incorporated by reference.

Pursuant to the Decision of Disapproval of Regulatory Action issued by the Office of Administrative Law (OAL) on June 8, 2010, the California Department of Corrections and Rehabilitation (CDCR or Department) issued a 2nd Notice of Modifications to Text of Proposed Regulations (hereinafter 2nd 15-Day Renotice) to clarify the text and correct the deficiencies noted in the OAL decision. This 2nd 15-Day Renotice (including the amended text, copies of four revised forms, and the Renotice letter) was distributed on June 11, 2010, to the several thousands of commenters, who responded with written or oral comments during the initial 45-day minimum comment period, and to those commenters who provided written comment during the 1st Notice of Modifications to Text of Proposed Regulations.

The 2nd 15-Day Renotice, effective from June 11, 2010, through June 25, 2010, was distributed via 15,192 electronic e-mails, 9,510 printed mail copies, and by one facsimile. The 2nd 15-Day Renotice was also posted to Department's Website.

### **2ND 15-DAY RENOTICE COMMENTS**

The comment period ended at 5:00 p.m. on June 25, 2010. To ensure that all persons who attempted to comment on the proposed changes had their comments considered, the Department elected to respond to all comments received up through 5:00 p.m. on June 28, 2010. Responses to comments received by 5:00 pm on June 25, 2010, are designated with an "S" number and those comments received after that time, but before 5:00 pm on June 28, 2010, are designated with an "A" number. A total of 8,312 comments were accepted during this period. In this 2nd 15-Day Renotice, the vast majority of the e-mail comments received were the same and based on a template letter. The comments, comment summaries, and responses to the comments are presented in the rulemaking record as "Comments Received During the 2nd 15-Day Renotice." Copies of the 2nd 15-Day Renotice written comments are being submitted to OAL as Exhibit C.

The comment summaries and responses to the 45-Day comment period can be found in the FSOR under Comment Summaries and Responses to Original Public Comments. The 15-Day Renotice comment summaries and responses can be accessed in the FSOR under the document 15-Day Renotice Comments and Responses.

### **RESPONSES TO OAL DECISION OF DISAPPROVAL OF REGULATORY ACTION**

#### **Necessity.**

On pages 15-17 of its Decision of Disapproval the OAL found that the CDCR did not comply with the necessity standard of the APA by failing to adequately explain in its ISOR why certain sections of the proposed regulations were drafted in the manner they were drafted. The following is provided to address the proposed sections at issue:

- Proposed section 3349.2.3: The Department requires news media witnesses to file a request to witness the execution within a designated ten-day filing period. The Department determined that a 10-day filing period was a sufficient period of time to allow news media organizations to request to witness an execution, and still provide sufficient time for the Department to select the news media organizations and process the required security clearances.
- Proposed section 3349.2.3(h)(3): The OAL requested further information concerning the purpose and necessity for the requirement that all witnesses view an execution orientation video. The Department determined that an execution is a unique event requiring that witnesses be prepared for what they will observe. Moreover, an execution is a solemn event and it is important to convey expected standards of behavior and respect for all witnesses.
- Proposed section 3349.3: The OAL determined that the Department failed to provide a rationale for why the four categories of individuals identified in the section of the proposed regulation were chosen to conduct the initial inmate interview. The Department made modifications to the language as part of the 2nd 15-Day Renotice, replacing the word “together” with the language of “in the presence of,” to clarify that it is only the Warden who personally performs the inmate interview, but does so in the presence of a Correctional Counselor II, Litigation Coordinator, and the Associate Warden-Specialized Housing Division. The Department identified these ranks of individuals based upon the experience and qualifications required for the rank or position as well as the other duties performed by that rank or position. The OAL also identified that there was no rationale provided as to why ten days was selected as the time period given to the inmate to decide on the method of execution. The Department has identified ten days because it is the maximum period of time that can be given to the inmate, yet still allow the institution staff sufficient time to prepare for the chosen method of execution.
- Proposed section 3349.3.4(e): The OAL found there was no stated necessity for the distinction between state-employed chaplains and non-state-employed spiritual advisors with respect to cell-front visits. The Department determined that state-employed chaplains have passed the rigorous background checks required of all prison employees, whereas non-state employed spiritual advisors are subject only to the screening required for prison visitors. The Department further determined that it is not feasible to obtain a full background check for non-state employed spiritual advisors in the days preceding an execution, and institutional security requires that non-state-employees receive a rigorous background check before being granted cell-front access.

### **Authority and Reference Citations.**

In its Decision of Disapproval, the OAL noted the Department improperly cited to the Penal Code sections for Authority and failed to tailor its reference citations. In the 2nd 15-Day Renotice, the Department tailored its citations to state and federal law referenced in the “NOTE” area at the end of each regulatory section. This was done to provide greater specificity to assist the reader regarding the statutory and legal underpinnings of each regulation section. Citations to Penal Code sections 3705 and 3706 were removed as references because their subject matter is unrelated to the proposed regulatory sections in which they appeared. Additionally, in modifying the Definitions section (section 3349.1.1) to comport with the OAL’s findings, the Department intended to delete reference to Penal Code section

3602 from the “Authority cited” portion of proposed section 3349.1.1 and add it to the “Reference” portion, but inadvertently failed to add it to the “Reference” citations. This is a nonsubstantive error that results in no impact to the proposed regulations or the public’s opportunity to provide a meaningful response. The Department will correct this nonsubstantive error. Finally, the United States Supreme Court’s decision of *Baze v. Rees* (2008) 553 U.S. 35, was added to the reference section of selected proposed regulation sections where appropriate. In *Baze*, the Supreme Court reviewed and upheld the constitutionality of the three-drug protocol for lethal injection.

## **Procedural Requirements of the APA.**

### **Title I CCR Section 20**

The OAL on page 18-19 of its Decision of Disapproval, questioned whether several of the proposed regulatory provisions contained in referenced documents complied with Title 1 CCR section 20. The questions are addressed below:

- The Media Advisory: the Department deleted language referring generally to “media advisory” from section 3349.2.3(j)(3), which suggested the existence of a document or form, and added language specially describing how media credentials may be obtained for executions.
- The “Lethal Injection Facility Activity Log.”: the reference to the “Lethal Injection Facility Activity Log” (tracking log) was deleted from section 3349.4.5, to clarify that any use of force should be noted according to the procedure required by section 3349.2.2(e)(4) and on CDCR Form 2182. This was a nonsubstantive change to delete reference to the tracking log and refer to the Departmental regulation and official form.

### **Explanation of Reasonable Alternatives Considered to the Regulations:**

On page 19 of its Decision of Disapproval, the OAL states that the Initial Statement of Reasons failed to include a description of alternatives included and reasons for rejecting any reasonable alternatives.

The Department considered as alternatives three chemical methods that utilized the same three chemicals given in the same order, but in different doses. In addition, the Department considered a one chemical process using sodium thiopental alone in a lethal dose. The primary reason for selecting the three chemical method and rejecting the single chemical protocol is that only the three chemical method has been ruled on and upheld by the Supreme Court of the United States. (*Baze v. Rees* (2008) 553 U.S. 35.)

### **Sufficiency of Responses to Commenters in the FSOR:**

On pages 19-21 of its Decision of Disapproval, the OAL identified four comments for which the Department did not identify a summary or response. Those comments are addressed on pages 13 through 17 of this document.

### **Statement of Mailing Notice:**

The OAL correctly identified that the Statement of Mailing Notice must certify that Notice of the Proposed Action was mailed at least 45 days prior to the Public Hearing and close of the Public Comment Period. The Department has confirmed that the Statement of Mailing for the original 45 day notice comment period had two incorrect dates which referenced the year 2010 instead of 2009. An updated document will be resubmitted to OAL that correctly provides that the notice was mailed on May 1, 2009, over 45 days prior to the close of the public comment period and the public hearing, which was held on June 30, 2009. The CDCR accepted comments through close of business July 1, 2009.

### **Consistency and Clarity.**

The consistency and clarity issues identified by the OAL in its Decision of Disapproval are addressed in the section entitled “2ND 15-DAY RENOTICE MODIFIED TEXT” in each identified proposed regulatory section or subsection.

### **General Explanations.**

In several places throughout the text, the Department has removed unnecessary quotation marks for correct punctuation. For example, in section 3349.3.3 quotation marks were removed from the phrase “7-day Pre-Execution Report.” Also, references to the Correctional Counselor II and Sergeant classifications were made uniform throughout the proposed regulations. In addition, definitions have been added for: 1) Associate Warden-Specialized Housing Division, 2) Official Witness, and 3) Special Visiting Team. Special Visiting Team was defined to clarify who comprises the team. Other editorial and punctuation changes have been made throughout where needed, or as recommended by the OAL. Additionally, for clarification, the Department added the acronym CDCR and form number, with revision date, where appropriate.

The Department also made nonsubstantive revisions to four forms included with the regulation package. These forms are the CDCR Form 1801-B, 2173, 2175 and 2176.

- CDCR Form 1801-B. In the 2nd 15-Day Renotice, the Department changed the signature block for Form 1801-B, Service of Execution Warrant-Warden's Initial Interview, to reflect that the Warden is responsible for signing the form. The signature block for the witness was modified to clarify that the Litigation Coordinator is responsible for signing as the witness. Additionally, after the distribution of the 2nd 15-Day Renotice, it was discovered that the revised CDCR Form 1801-B (Rev. 06/10) contained a typographical error.. Specifically, under the sentence "Inmate has received a copy of the Warrant of Execution but refuses to sign for it," the signature line which was intended to read "Warden's Signature" instead read "Inmate's Signature." This typographical error was corrected on the final copy of the form to read "Warden's Signature" which is the correct signature required. Also, in accommodation to a comment received, the Department corrected one grammatical error in the first sentence of the form by deleting the letter “a” after the word “have” so that it now reads “have received a copy”. Also, in the first line the Department changed the subtext from “print or type fill” name to “print or type full” name. These are nonsubstantive changes.
- CDCR Form 2173. In the 2nd 15-Day Renotice in response to a concern raised by OAL, the form was revised to better serve the clinical assessment needs of the Alienist. The

changes include removing conclusory language which OAL found to be contrary to independent review. This resulted in the deletion of paragraphs 3, 4, and 5. The Department added additional lines for the Alienist observations and input and also provided examples of mental status. The Department added check boxes under the Inmate's name to allow the Alienist to determine if the inmate understood or did not understand the nature of the death penalty and why it was imposed. The Department also provided a sentence of text reading "It is my opinion that the Inmate \_\_\_\_ (name) is legally competent/not legally competent (circle one) to undergo execution", to allow the Alienist to make an independent determination of competency. The revision date of 01/09 now reflects 06/10. A copy of each version of the form was made available for review during the 2nd 15-Day Renotice.

After the distribution of the 2nd 15-Day Renotice, and in response to a comment, the Department deleted a portion of the first sentence on page 2, specifically the text "understood his circumstances and that he". This was a nonsubstantive change for corrective purposes to remove redundant text that was already included in a check box below.

- CDCR Form 2175, (as described in subsection 3349.2.2(j)(2)(C)). In the 2nd 15-Day Renotice the form was modified to better serve the clinical assessment needs of the Alienists. The changes include removing conclusory language which OAL found to be contrary to independent review. This resulted in the deletion of paragraphs 3 and 4. The Department added additional lines for the Alienist observations and input and also provided examples of mental status. A copy of each version of the form was made available for review during the 2nd 15-Day Renotice.

After the distribution of the 2nd 15-Day Renotice, the Department made an additional nonsubstantive change on page 2 by removing the text "and meets the criteria of his death sentence as scheduled." This was to clarify that the Alienist is only determining competency. This modification does not result in a change to the intent, meaning and purpose of the form. The revision date of 01/09 now reflects 06/10

- CDC Form 2176, subsection 3349.4.3(a)(3). This form was amended to include a section for tracking saline and to clarify that the Team Leader is to sign the form in the final signature block. Finally, for clarity the term "Evidence", used in several places, was removed from the form in response to concerns identified by OAL.
- **Section 3349.3(i)(5)(A)**. In a subsequent review, the Department determined that a modification to this text was made in error in the 2nd 15-Day Renotice. The word "inmate" which was erroneously deleted, is being restored. It follows the phrase "Grade A" and is followed by a subsection referring to "Grade B inmates." This modification restores text from the original notice and is nonsubstantial.
- **Special Note to the following Modified Text descriptions:** As previously described, as part of the 2nd 15-Day Renotice, four forms were updated and revised with explanation. As a result, the revision date of each of these forms changed from (01/09) to (06/10). After distribution of the 2nd 15-Day Renotice it was discovered that due to an oversight, the new (06/10) revision date to two of the forms listed below may not have been made to each reference in the text. To

correct this oversight, which is a non-substantive change, the final text, where appropriate, will reflect the correct (06/10) dates. The forms in question are:

CDCR Form 1801-B (Rev. 06/10), Service of Execution Warrant-Warden's Initial Interview  
CDCR Form 2176 (Rev. 06/10), Lethal Injection Chain of Custody-San Quentin State Prison

## **2nd 15-DAY RENOTICE MODIFIED TEXT**

The CDCR provided the following changes as described below. The consistency and clarity issues identified by the OAL in its Decision of Disapproval are addressed below. Some additional explanations and/or corrections to the 2nd 15-Day Renotice are also included.

### **3349. Method of Execution.**

**Subsection 3349(a)** is amended to reflect a change to CDCR Form 1801-B. This form was changed to clarify that it is the Warden who is completing this form and that the Litigation Coordinator is the witness to the Warden's signature. The revision date on the form has also changed from (1/09) to reflect a new revision date (06/10). A copy of each version of the form has been made available for review.

**Subsection 3349(d)** was amended for corrective purposes to substitute the word "choose" for the word "elect" for consistency throughout this article. However, upon further review of the text following the distribution of the 2nd 15-Day Renotice, the Department became aware that the word "choose" was part of the original text of proposed regulations and therefore the designation of change was in error.

**Additional Changes to Subsections 3349 (a), (b), (c), and (d).** After the distribution of the 2nd 15-Day Renotice, it was discovered that due to an inadvertent omission, the word "selection," which is current text, had not been referenced in the proposed text versions. Instead, the word "choice" had been presented but not underlined as new text. To correct this, the final text version will show the word "selection" in strikethrough for deleted text, and the word "choice" which is the intended word that was to be adopted, in underline. This correction does not change the original intent or meaning of the language being adopted as the words "selection" and "choice" are synonymous with each other. It was for consistency with other text that the word "choice" is being adopted. Also, in the first sentence in subsection (a), the word "elect" was omitted as current text and the word "choose" presented as current text being adopted but not underlined. The final text will show the correct text in strikethrough and underline.

Additionally, in subsection (a), the wording "California Department of Corrections and Rehabilitation" which is being adopted by the Department to clarify the acronym CDCR, was not presented in underline as new text, although that was the intent. The 2nd 15-Day Renotice, for corrective purposes, included as underline the words "and Rehabilitation" but did not include the complete text California Department of Corrections and Rehabilitation. To correct this, the final text will show it all in underline as new text.

Finally, in (b) the word "witnessed" which is being adopted by the Department to clarify that the CDCR Form 1801-A will record the inmates witnessed choice, was not presented in underline as new

text, although that was the intent. It is a nonsubstantive grammatical correction. The final text will show the correct text in strikethrough and underline.

### **3349.1.1. Definitions**

**Section 3349.1.1, Definitions** is being amended to add the definitions for Associate Warden-Specialized Housing Division, Official Witness, and Special Visiting Team. The additional definitions were necessary in order to clarify the meaning of each term used in the regulations. Changes to the subsection letter ordering have been made to accommodate the new additions. After the 2nd 15-Day Renotice the Department made the nonsubstantive change capitalizing the “V” and “T” in Special Visiting Team for consistency.

After the 2nd 15-Day Renotice it was determined that the definition of “Witness Areas” should be amended to delete the number “12” between “Official” and “Witnesses”. This is a nonsubstantive change for consistency with the definition of “official witnesses” and proposed section 3349.2.3. All members of the public selected by the Warden are official witnesses, not simply the minimum of 12 reputable citizens required under Penal Code section 3705

### **3349.1.2. Selection, Recruitment and Annual Review of Lethal Injection Team Members.**

**Subsections 3349.1.2(a)(2) and (3)** are amended for citation correction to add a reference to (b) to clarify the reference to (b)(2)and (3), and for grammar correction adding the word “to” to (3).

**Subsections 3349.1.2(a)(4)(B)** is amended to delete language which is relocated to 3349.4.5(g)(8). This is necessary as this is the more appropriate location for the text and will clarify that the physician is present for the execution.

**Subsection 3349.1.2(d)** is amended to add reference to subsection 3349.1.2(f). This was necessary to reference the full set of qualifications for candidates.

**Subsection 3349.1.2(e)(6)** is amended to clarify that only the most recent annual, permanent employee performance evaluation is considered for selection to the team. This is due to the fact that the employee performance evaluations are normally retained for only one year pursuant to the Department’s document retention schedule. After the 2nd 15-Day Renotice, in the final text, for corrective purposes, a nonsubstantive change was made to the word “annual”, changing it from upper case to lower case letter “a”.

### **3349.1.3. Lethal Injection Team Duties.**

**Subsection 3349.1.3(c)(3)(D)** changes the word “procedure” to “article”. This more correctly references the lethal injection process as described in Article 7.5.

### **3349.1.4. Lethal Injection Team Training.**

**Subsection 3349.1.4(c)(2)(F)** deletes the word policy and inserts a reference to existing CDCR regulations that govern use of force. The word “techniques” is removed and replaced with the word “options” for language consistency with section 3268 et seq.

## **3349.2.1 Execution Site Operation**

**Subsection 3349.2.1(e)(4)** is amended. After the 2<sup>nd</sup> 15-Day Renotice the Department made the nonsubstantive change capitalizing the “A” in (e)(2)(A) to correct the citation.

### **3349.2.2. Lethal Injection Record Keeping and Documentation.**

**Subsection 3349.2.2(c)** is amended to establish a consistent reference for a Correctional Counselor II and to remove an archaic reference to “Condemned Unit.”

**Subsection 3349.2.2(d)** is amended to add the word “transmitted” to correctly reflect what happens to all documents and notices between San Quentin State Prison and the CDCR headquarters.

**Subsection 3349.2.2(j)(1)(G)** adds for clarification the acronym for Division of Adult Institutions, (DAI) which correctly reflects the Director that the subsection is referencing. In addition, for consistency, the words “alienist panel” are now lower case. After the 2<sup>nd</sup> 15-Day Renotice, it was decided to change the word “alienist” to uppercase for consistency with other text. This is a nonsubstantive change.

**Subsection 3349.2.2(j)(2)(A)** is amended. After the 2<sup>nd</sup> 15-Day Renotice, in accommodation to a commenter, the Department added the complete reference to CDCR Form 2173 (06/10), 20-Day Pre-Execution Report. This change includes adding the word “Pre” to “Execution” for correction and capitalizing the word “Day”. As this is the first reference to this form in the text, the form is being incorporated by reference into the proposed regulations.

**Subsection 3349.2.2(j)(2)(C)** is amended. After the 2<sup>nd</sup> 15-Day Renotice the Department added the word “Pre” to “Execution” for correction in reference to CDCR Form 2175 (06/10) 7-Day Pre-Execution Report. The subsection is also amended to reflect a change to CDCR form 2175. The revision date of 01/09 will now reflect 06/10. This form is being revised to better serve clinical assessment needs of the Alienists. Refer back to page 6 for further clarification. A copy of each version of the form has been made available for review.

### **3349.2.3. Witnesses, Observers, Media, and Information Releases.**

**Subsection 3349.2.3(c) and (c)(1)** changes “Witness Viewing Rooms” to “Witness Areas” to conform with the definition of “Witness Areas” in section 3349.1.1, which includes the 3 separate viewing rooms. The Department also made the nonsubstantive change from “will be approved” to the mandatory “shall be permitted” to further clarify the maximum number of persons in the witness area as 50. After the 2<sup>nd</sup> 15-Day Renotice, a colon was added to (c)(1), a nonsubstantive change to correct a typographical error. Additionally, for punctuation correction a period was added to (c)(1)(C)-(F).

**Subsection 3349.2.3(c)(1)(A) through (F)** lettering has been added for organizational purposes.

**Subsection 3349.2.3(c)(1)(B)** is amended to clarify that, with the exception of the witnesses specifically identified in Penal Code section 3605, all other witnesses must be “reputable citizens” selected by the Warden pursuant to Penal Code section 3605. The inmate’s attorney was added as an official witness to ensure compliance with Penal Code section 3605, and is considered an official witness solely for the purpose of ensuring that counsel’s presence at the execution is consistent with the statute.



The terms “Governors Office” and “Inspector General” were removed to conform with Penal Code section 3605. Lastly, reference to “news media witnesses” was relocated into subsection (c)(1)(B) for appropriate placement within the text.

**Subsection 3349.2.3(e)(1)(C) and (e)(2)** were amended after the 2nd 15-Day Renotice to remove quotation marks around the words, on file, and pool, for consistency.

**Subsection 3349.2.3(d)** is amended to remove the word “observer” and replace it with the phrase “reputable citizen” in order to conform with the language in Penal Code section 3605. The Department also notes that the 2nd 15-Day Renotice did not add additional witnesses in the Infusion Control Room. Each of the three people, (one individual from the Governor’s Office, Inspector General and Office of Attorney General), were referred to in the original text of the proposed regulation, subsection 3349.2.3(d) as an “observer” to be present in the Infusion Control Room. In response to OAL’s Decision of Disapproval, the 2nd 15-Day Renotice clarified that each of the three shall be a “reputable citizen selected by the Warden in accordance with Penal Code section 3605. This was done solely to acknowledge that Penal Code section 3605 is the sole statutory authority permitting a person to be present at an execution, and does not increase the number of persons permitted to be present beyond the number in the initial text of the proposed regulations.

**Subsection 3349.2.3(e)(2)** language has been changed to emphasize the Warden’s responsibilities for selecting the media witnesses.

**Subsection 3349.2.3(i)(1)** was amended to clarify that most witnesses will be escorted to the designated staging areas after the pronouncement of death and then proceed out of the institution. News media who have been selected as witnesses pursuant to section 3349.2.3(e) will be transported to the media area pursuant to section 3349.2.3(i)(2).

**Subsection 3349.2.3(j)(3)** was amended by deleting general language referencing “media advisory.” A specific description of how media credentials may be obtained for executions was added.

**Subsection 3349.2.3(j)(4)** adds language to clarify that each news media organization applying will be limited to one representative, not including any representative selected as a witness, and the potential need for pool arrangements. This is necessary in order to accommodate as many media firms as possible to ensure the broadest coverage possible within the limitations of San Quentin State Prison.

**Subsection 3349.2.3(l)(1)** removed the number “12” preceding “Official Witness” in recognition of the fact that 12 is the minimum, not maximum, number of official witnesses.

### **3349.3. Chronology of Events Prior to a Scheduled Execution.**

**Subsection 3349.3(a)(1)(A)** changes the word “procedure” to “article”. This more correctly references the lethal injection process as described in Article 7.5.

**Subsection 3349.3(a)(1)(B)** replaces “together” with the language “in the presence of a” to clarify that the Warden personally performs the act described accompanied by a Correctional Counselor II, Litigation Coordinator and Associate Warden-Specialized Housing Division for each specific act.

**Subsection 3349.3(c)(1)** is amended to clarify that the Warden personally performs the acts set forth in the subsection 3349.3(a)(1) and the Associate Warden-Specialized Housing Division is present as an observer. This is also necessary to be consistent with other text in these regulations.

**Subsection 3349.3(e)** is amended to establish a consistent reference for a Correctional Counselor II and to remove an archaic reference to “Condemned Unit.”

**Subsection 3349.3(e)(1)** is amended to clarify that the Warden personally performs the acts set forth in subsection 3349.3(a)(1) and the Correctional Counselor II is present as an observer. This is also necessary to be consistent with other text in these regulations.

**Subsection 3349.3(f)(2)** is amended to clarify that the Warden personally performs the acts set forth in subsection 3349.3(a)(1)(B) and sets forth the Litigation Coordinator’s specific duties associated thereto. This is also necessary to be consistent with other text in these regulations.

**Subsection 3349.3(f)(5)(A)** is amended to delete the term “this” before Master Execution File and replaces it with the term “the” to clarify that the subsection is referencing the same Master Execution File as referenced in amended subsection 3349.1.1(w). The subsection is also amended to delete the term “Litigation Coordinator’s” and add the term “Warden’s office complex” to clarify that the Litigation Coordinator’s office is in the Warden’s office complex.

**Subsection 3349.3(f)(5)(B)** is changed to clarify that the file continues to be maintained in the Warden’s office complex.

**Subsection 3349.3(g)(2) through (g)(3)(A)** are amended to remove an archaic reference to “Condemned Row.” In the 2nd 15-Day Renotice, it was mistakenly described as being through (i)(5)(A). The correct reference to amended subsection 3349.3(i)(5)(A) is provided below.

**Subsection 3349.3(i)(5)(A)** deleted the word “inmate” from the reference to Grade A visiting. This was inadvertent and is being restored as set forth on page 5 of this document.

#### **3349.3.1. Responsibilities and Tasks Approximately 45 days Prior to a Scheduled Execution.**

**Subsection 3349.3.1(a)(1)** is amended by deleting the number designation of “12” to be consistent with and reflect that pursuant to Penal Code section 3605 the warden must select a minimum of 12 official witnesses.

**Subsection 3349.3.1(a)(2)** amends the reference to 20-day Pre-Execution Report for internal consistency. In addition, a cross reference to subsection (d)(1) is provided for clarity. After the 2nd Renotice in accommodation to a commenter, the Department adds CDCR Form 2173 (06/10) to the title of the 20-Day Pre-Execution Report. Additionally, the lowercase “d” was made uppercase in the word “Day”. These are nonsubstantive changes for correction.

**Subsection 3349.3.1(a)(2)(C)** removes an archaic reference to “Condemned Row.”

**3349.3.1(b) and (b)(3)(A)** were amended after the 2nd 15-Day Renotice to delete a comma and add a hyphen to “Associate Warden-Specialized Housing Division” for consistency with other proposed sections.

**Subsection 3349.3.1(c)(2)** is amended to clarify that the Public Information Officer must consult with the Warden regarding selection of media witnesses consistent with Penal Code section 3605. Consistent with the language in subsection 3349.2.3(c)(1)(B), the Warden has the final authority to select the official witnesses, including the media witnesses.

**Subsection 3349.3.1(d)(1)** is amended to reflect a correction to the CDCR form 2173 which will now reference the new revision date 06/10. This form is revised to better serve the clinical assessment needs of the Alienists. A copy of the form has been made available for review. Refer to page 4 for further description. After the 2nd 15-Day Renotice, due to the change in 3349.2.2(j)(2)(A), the wording “which is incorporated by reference” is deleted as this is no longer the first reference to this form. The language “within the Warden’s 20-day report deadline” was deleted to reflect the Penal Code section 3700.5 statutory 20-day Pre-Execution Report deadline and delete any suggestion of a Warden imposed deadline. The subsection was also amended to add the language “Governor and the” before “Warden” to clarify that the Alienists submit their reports to the Governor’s Office as well as to the Warden in compliance with Penal Code section 3700.5.

**Subsection 3349.3.1(e)(3) and (f)(2)** deletes the word “Warden’s” to correctly reference that this is the statutory 20-day report deadline and not a Warden imposed deadline.

**Subsection 3349.3.1(f)** is amended to remove an archaic reference to "Condemned Row."

### **3349.3.2. Responsibilities and Tasks Approximately 30 Days Prior to a Scheduled Execution.**

**Subsection 3349.3.2(a)(1)** is amended to clarify that information received pursuant to this subsection will be forwarded to the Alienists as long as their duties continue. This will ensure the timely receipt of all information relevant to the preparation of the Alienists’ 7-day Pre-Execution Report. Moreover, information received at any time prior to the execution relevant to the inmate’s sanity will be considered pursuant to Penal Code section 3701. Additionally, a punctuation change was made removing the comma after the word execution.

**Subsection 3349.3.2(a)(2)** adds additional language to clarify a period of time and is amended to correct a reference to the 20-Day Pre-Execution Report for internal consistency. Additionally, after the 2nd 15-Day Renotice, in accommodation to a commenter, the Department added CDCR Form 2173 (06/10) to the form title of 20-Day Pre-Execution Report, and the lower case “d” was made an uppercase in the word “Day”.

**Subsection 3349.3.2(b)** removes the quotation marks from 20-Day Pre-Execution Report for consistency within the regulation. Due to an oversight, the subsection 3349.3.2(b) change was not provided in the 2nd 15-Day Renotice text showing the deletion of the quotation marks. This non-substantive change will appear in the final text. Additionally, after the 2nd 15-Day Renotice, in accommodation to a commenter, the Department added CDCR Form 2173 (06/10) to the form title of “20-Day Pre-Execution Report”.

**Subsection 3349.3.3(e)and(e)(1)** were amended after the 2nd 15-Day Renotice making the nonsubstantive change to a capital “A” in the word “Alienist” for consistency with other proposed regulatory sections.

### **3349.3.3. Approximately Ten Days Prior to a Scheduled Execution.**

**Subsection 3349.3.3(a)(1)** is amended. After the 2nd 15-Day Renotice, the Department added the Form number and revision date CDCR Form 2175 (06/10) to the form title “7-Day Pre-Execution Report”. This is for correction and consistency with other text.

**Subsection 3349.3.3(a)(1)(A)** is amended. After the 2nd 15-Day Renotice, the Department added the Form number and revision date CDCR Form 2173 (06/10) to the form title “20-Day Pre-Execution Report”. This is for correction and consistency with other text.

**Subsection 3349.3.3(a)(1)(B)** is amended. After the 2nd 15-Day Renotice, the Department added the Form number and revision date CDCR Form 2175 (06/10) to the form title “7-Day Pre-Execution Report”. This is for correction and consistency with other text.

**Subsection 3349.3.3(a)(1)(C)** amends the reference to the 20-day Pre-Execution Report. This is necessary for consistency within the regulation. After the 2nd 15-Day Renotice, the Department added the Form number and revision date CDCR Form 2173 (06/10) to the form title “7-Day Pre-Execution Report”. This is for correction and consistency with other text.

**Subsection 3349.3.3(a)(2)** was amended to correct a grammatical error by changing the word “included” to “including”.

**Subsection 3349.3.3(e)(3)** is amended to reflect a correction to the CDCR Form 2175 which will now reference the new revision date (6/10)

**Subsection 3349.3.3(g)** is amended to remove an archaic reference to "Condemned Row."

#### **3349.3.4. Five Days Prior to a Scheduled Execution.**

**Subsections 3349.3.4(a)(1) and (b)(1) and (d)** are amended to remove an archaic reference to “Condemned Row” and add the term “inmate” in place of the pronouns “he or she” for consistency with other sections in the proposed regulations and Division 3 of Title 15.

**Subsection 3349.3.4(d)(6)** was amended after the 2nd 15-Day Renotice to delete a comma and add a hyphen to Associate Warden-Specialized Housing Division for consistency with other proposed sections.

#### **3349.3.6. Three Days Prior to a Scheduled Execution.**

**Subsection 3349.3.6(c)(1)** is amended to state “the Correctional Captain, Central Services Division” to reflect the appropriate title.

#### **3349.4.1. Twenty-Four Hours Prior to a Scheduled Execution.**

**Subsection 3349.4.1(c)(1)** is amended to reflect a correction to the CDCR Form 2176 which will now reference the new revision date 06/10.

#### **3349.4.3. Approximately Three Hours Prior to a Scheduled Execution.**

**Subsection 3349.4.3(a)(3)(A)**, with the deletion of (a)(3)(B) as described below, is incorporated into subsection 3349.4.3(a)(3) and amended to clarify that members of the Infusion Sub-Team shall verify

all lethal injection chemicals and saline at the time of transfer. This section is also being amended to reflect a correction to the CDCR Form 2176 which will now reference the new revision date 06/10.

**Subsection 3349.4.3(a)(3)(B)** is deleted and relocated to 3349.4.6(k)(1) for more appropriate placement relative to the timing of the process.

**Subsection 3349.4.3(b)(5)(B)** adds language to clarify that the Record Keeping Sub-Team member shall utilize CDCR Form 2177 for documentation. This corrects an incomplete reference.

#### **3349.4.4. During The Day of a Scheduled Execution.**

**Subsection 3349.4.4(e)(2)** is amended to correct a grammatical error and to clarify that the inmate's attorney is not included in the number of the inmate's invited witnesses.

#### **3349.4.5. Administration of the Lethal Injection Chemicals.**

**Subsection 3349.4.5(b)(5)** is amended to clarify the documentation required in the event of the use of force. This is necessary for consistency with other regulations.

**Subsection 3349.4.5(g)(7)** is amended for internal consistency.

**Subsection 3349.4.5(g)(8)** has been amended to reflect that the physician will be present at the execution to monitor the electronic device(s) for the purpose of determining when the inmate has expired

#### **3349.4.6. Post Execution Procedure.**

**Subsection 3349.4.6(k)(1)** this has been relocated from subsection 3349.4.3(a)(3)(B) for more appropriate location in the text.

**Subsection 3349.4.6(l)(2)** adds the word counseling to correctly describe what is being provided for Lethal Injection Team members experiencing post execution trauma.

#### **Sufficiency of Responses to Commenters in the Final Statement of Reasons (from page 3).**

(1) OAL found that the CDCR failed to respond to a comment by indicating a change to the regulation or explaining the reasons for no change to the following comment provided by **Commenter #3**, along with hundreds of others, concerning proposed subsection 3349.3.4(e). The commenters asserted that the Department had not explained the disparate treatment of spiritual advisors in terms of the ability of state-employed chaplains to perform spiritual functions at the inmate's cell front while non-state-employed spiritual advisors must use the visiting room. See subsection 3349.3(i).

The Department's response, which OAL found to be insufficient, was as follows:

The proposed regulations provide for the inmate to consult with a spiritual advisor of his or her choosing. (§3349.3.1(e); 3349.3.3(a)(2), (f); 3349.3.4(e)(1)-(3); 3349.4.2(b)(1)-(3).) So long as the inmate follows pre-approval requirements and in accordance with provisions of law and the Department regulations, the inmate

can utilize a spiritual advisor not provided for or employed by the state. (§ 3210(d); 3349.3.4(e)(2)-(3); 3349.4.2(b)(1)-(2).) Accommodation: None.

The Department's supplemental response: The only distinction between state chaplains and non-state employed spiritual advisors under the proposed regulations is that chaplains employed by the Department can visit the inmate on the tier in front of the cell and non-state employed spiritual advisors must visit with the inmate in the visiting area. Other than one possible location for the visit, the inmate's access to a state employed chaplain and a visiting spiritual advisor is identical. State employees have been subject to a more extensive background check than is required for a visitor. (See 15 Cal. Code Regs. § 3173 – Processing of Approved Visitors.) Employees may be present on a tier in a condemned housing unit without raising the concerns about institutional security posed by non-employee visitors. Although, there is no statute that specifically gives prisoners the right to consult with a spiritual advisor, the proposed regulation recognizes the condemned inmate's First Amendment right to consult with a spiritual advisor of his choosing. It then provides for the broadest access to the spiritual advisor that is consistent with institutional security. The California Supreme Court has upheld the distinction between state employed chaplains and non-employee spiritual advisors. (*Thompson v. Department of Corrections* (2001) 25 Cal.4<sup>th</sup> 117.) *Thompson* held that the need for prison security justified permitting a state employed chaplain, but not an outside spiritual advisor, to remain with the inmate in the last moments preceding an execution. (*Id.* at pp. 133-134.)

(2) The OAL could not identify a summary or response for the following comments.

**Commenter #35**, and numerous others, stated that the Department added approximately 500 pages of material to the rulemaking file on or about June 15, 2009.

In its FSOR, the Department provided the following response:

Government Code section 11346.8(d) provides that “No agency shall add any material to the record of any rulemaking proceeding after the close of the public hearing or comment period, unless the agency complies with Section 11347.1” Section 11347.1 provides that when an agency adds any technical, theoretical, or empirical study, report or similar document to the rulemaking file after publication of the notice of the proposed action and relies on the document in proposing the action, it shall make the document available for at least 15 calendar days before the proposed action is adopted. The Department notified interested parties and the public that three documents were omitted unintentionally from the original notice and ISOR. The Department acknowledged in the Notice of Modifications, that it failed to include the following documents in the Initial Statement of Reasons: “Intraosseous infusion: PALMed, Emergency Vascular Access: N. John Bosomworth; Lethal Reflection; Santa Rosa doctor Jay Chapman; RANDI ROSSMANN, THE PRESS DEMOCRACY [sic], April 29, 2007.” “Arkansas Dept. of Corrections procedure for execution: Administrative office of the U.S. courts, PACER Service Center.” Copies of these documents were always available in the official rulemaking file. The Department's notice of Modifications and additional 15-Day public comment period cured any infirmity. The Arkansas newspaper articles were not part of the Arkansas Department of Corrections procedure and were not part of those documents that the Department claimed to have relied upon. That the newspaper articles were not part of the Arkansas

Department of Corrections procedure for execution is apparent on its face. They were erroneously attached to the Arkansas procedure. In addition, the document “Intraosseous Infusion: Not Just for Kids Anymore; DeBoer, Scott RN, MSN, CEN, CCRN, CFRN” was incorrectly included in the supplemental documents that were placed on the Department website. It too, was never listed on the ISOR and it was never part of the rulemaking file. At worst, the public received additional information that otherwise would not have been made available. However, these errors did not deprive the public of a meaningful opportunity to review and comment on the proposed regulations. Accommodation: None.

It appears that although the Department did in fact substantively respond to the commenter in question and commenters with similar comments, the Department, as a clerical error, failed to list this commenter’s number with the response.

**Commenter #757** commented on the need for provisions to be added to the regulations which specified what will be done in the event of something unforeseen occurring just prior to the scheduled execution in relation to the inmate’s health or if a witness notices during the lethal injection procedure that the inmate is evidencing consciousness. The commenter stated that the regulations must include the criteria the Warden must use in deciding when to terminate an execution.

The Department believes that it did substantively respond to the commenter’s concerns. However, due to clerical error, the Department failed to list commenter’s number with the response. The Department previously responded:

The proposed regulations describe the manner in which the inmate’s consciousness will be assessed including an Intravenous Sub-Team member ‘brush[ing] the back of his or her hand over the inmate’s eyelashes, and speak[ing] to, and gently shak[ing] the inmate.’ “If the inmate is unresponsive, it will demonstrate that the inmate is unconscious.” (§3349.4.5(g)(5)(A).) The proposed regulations, section 3349.5(e)(7)-(8), require one Intravenous Sub-Team member to continually monitor the saline drip from the Infusion Control Room while another Intravenous Sub-Team member remains in the execution room to monitor the intravenous lines and continually assess the inmate’s consciousness throughout the execution. Immediately after the administration of the first 1.5 grams of sodium thiopental, a consciousness check on the inmate is performed and the observations are recorded. (§3349.4.5(g)(5)(A).) Then again after the administration of the second syringe of 1.5 grams of sodium thiopental and a saline flush, prior to the administration of pancuronium bromide, the inmate’s consciousness is assessed before proceeding (§3349.4.5(g)(5)(B)-(C).) If the assessment preceding the pancuronium bromide indicates that the inmate is not unconscious, the Warden will order that the execution process halt through the primary catheter and be re-initiated through the back-up by administering the barbiturate [sic] again to induce unconsciousness. (§3349.4.5(g)(6).) Should there be a failure with the primary intravenous catheter, section 3348.4.5 (g)(3) requires that the execution proceed utilizing the back-up intravenous catheter. Therefore, there are sufficient consciousness checks in place to ascertain that the inmate is not conscious before proceeding to administer the other two drugs. This will prevent the

pancuronium bromide from being administered to a conscious inmate and preclude the inmate experiencing any pain. Indeed the Supreme Court noted that some of the means to assess consciousness set forth in the proposed regulations go beyond the minimum necessary to meet the requirements of the Eight Amendment. (*Baze v. Rees* (2008 553 U.S. 35.) Accommodation: None.

As a further response to the comment, the Department notes that the proposed regulations describe the processes in place to ensure appropriate monitoring and response to problems or issues that may arise. Notably, the proposed regulations require that the inmate's behavior be continuously monitored by unit staff for the final five-days prior to a scheduled execution with documentation completed every 15 minutes. (§3349.3.4 (a)(2).) The proposed regulations also require that the Warden be notified immediately and take any necessary steps to evaluate and report if the inmate displays unusual or inappropriate behavior. (§3349.3.4 (a)(2)(A)-(B).) The Team Leader is required to assign a Sub-Team to ensure direct and constant supervision of the inmate in the final six hours prior to the scheduled execution. (§3349.1.3 (c)(1)(B).) The Intravenous Sub-Team is required to perform consciousness checks as specified in subsection 3349.1.3(c)(2)(C). The proposed regulations also provide for training to ensure appropriate direct and constant supervision of the inmate; training for the Intravenous Sub-Team on use of an electric monitor for vital signs; training pertaining to potential problems and recommendations for avoidance or resolution; performance of consciousness checks; and monitoring of intravenous lines. (§3349.1.4). Finally, dedicated telephone lines to the State Supreme Court, the Governor's Office, and the State Attorney General's Office shall be opened and staffed beginning at least fifteen minutes prior to a scheduled execution. (§3349.2.4, 3349.4.4(a)(5).) This ensures that an execution will not proceed in the event of a last minute grant of clemency or a stay of execution.

**Commenter #948**, State of California, Prison Health Care Services, commented that: the regulation must clearly state the current CPHCS clinical staff, PCP, Nursing and Pharmacy staff cannot participate in any aspect of the execution [including] medical evaluations, purchasing drugs, securing the drugs, starting IVs, determining consciousness of inmate, monitoring heart activity, determining death, and disposal of execution drugs... it is a clear conflict for our staff's medical ethics.

An execution is not a medical procedure. (*Morales v. Tilton* (N.D. Cal.2006) 465 F.Supp.2d 972, 983.) The proposed regulations provide that "the attending physician will monitor the electronic device(s) showing the inmate's vital signs and determine when the inmate has expired." (15 CCR § 3349.4.5 (g)(8).) This is well within the scope of a physician's license and expertise. Moreover, it is already unlawful to compel a physician to attend an execution. (Pen. Code § 3605(c).) However, nothing in the proposed regulations compels any clinical staff to be a member of the Lethal Injection Team if the person believes it would violate their medical ethics as participation is voluntary. Finally, there is no reference to pharmacists in the proposed regulations. Accommodation: None.

(3) The OAL found that the Department's response to many comments did not comply with Government Code subsection 11347.1 As a result of the 15-Day revised text Notice, Commenter #R10172, among many other, commented as follows:

The modified regulations are not supported by an adequate record. The CDCR relies upon the Press Democrat Article about Dr. Jay Chapman, but fails to describe reasonable alternatives contained therein and the reasons for rejecting them. In materials released January 4, 2010, the CDCR indicated for the first time that one of the materials reviewed and considered was a 2007 article from the Santa



Rosa Democrat. The article is about Dr. Jay Chapman, the person who first suggested a three drug execution procedure. According to the article, the original creator of the three-drug lethal injection formula has suggested ways to reform the process, including keeping up with changing drugs and science and proper training of lethal injection team members. Given that Dr. Chapman suggests, there are other alternatives, continued use of the paralytic drug is unreasonable, unnecessary and unduly burdensome to the rights of the public and the individuals being executed. Dr. Chapman suggests the proposed procedure is inhumane. The lethal injection procedures' creators think it is a failed experiment any way it is implemented. CDCR seems to have ignored the part of the article where Dr. Chapman suggests changing the procedures as science advances. CDCR continues to use the three-drug protocol despite the very growing evidence that it is an unsafe and potentially tortuous form of execution.

The Department responded to the comment as follows:

The majority of this comment is directed toward the Department's statement of necessity set forth in the ISOR, rather than to the Notice of Modifications to Text of Proposed Regulations. Therefore, pursuant to Government Code section 11346.8 (c), the Department will not respond to those portions of this comment. The remainder of the comment concerns the listing of three documents in the Notice of Modifications to Text of Proposed Regulations that were included in the rulemaking file but inadvertently omitted from the ISOR. Because the omission of those documents was inadvertent, the Department had already addressed in the ISOR the alternatives it considered and its reasons for adopting the proposed three-chemical protocol. Accommodation: None.

From the response above, OAL stated that pursuant to subsection 11347.1(d), the Department must respond to comments that are based on the relied-upon document added to the rulemaking file subsequent to publication of the notice. The Department responds as follows:

Dr. Chapman's article proposed changes to the three chemical protocol that had not yet been utilized for an execution and had not been upheld by the Supreme Court of the United States. In contrast, the three chemical process set forth in the proposed regulation is substantially the same as the protocol upheld by the Supreme Court of the United States in *Baze v. Rees* (2008) 553 U.S. 35. Accordingly, the Department rejected Dr. Chapman's proposals in favor of the process that has been upheld by the Supreme Court.

#### **Other Issues:**

**Commenter #814 Attachments.** An additional issue was brought to the attention of the Department by the OAL regarding some missing attachments related to a comment provided by Commenter 814 on behalf of the ACLU, as presented in the Comment Summaries and Responses to Original Public Comments. A copy of these attachments will be included in the resubmitted package to OAL.